



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON, D.C. 20370-5100

TRG

Docket No: 1715-99

13 November 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Naval Reserve filed an application with this Board requesting, in effect, reinstatement in the Naval Reserve and constructive service from the date of his discharge on 24 July 1992 until he reenlisted in the Naval Reserve on 29 April 1998.

2. The Board, consisting of Ms. Madison, Ms. McCormick and Mr. Mazza, reviewed Petitioner's allegations of error and injustice on 31 October 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although it appears that Petitioner's application was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner enlisted in the Naval Reserve on 30 September 1988. At that time, he had completed seven years of active service on prior enlistments. He subsequently served on active duty from 26 August 1990 to 6 March 1991.

d. The record shows that Petitioner suffered a serious knee injury on 9 December 1991. Seven days later he was advanced to OS1 (E-6). Apparently, nothing else happened until 2 May 1992. On that date he acknowledged that he was not physically qualified to drill, and that a request for determination for retention in

the Naval Reserve would be forwarded to the Bureau of Medicine and Surgery (BUMED). At that time, he was transferred to records review status pending the determination. On 11 June 1992 BUMED stated as follows:

.... Subject reservist is at this time, not physically qualified for participation in inactive duty training (Drill) or active duty for training.

... It is recommended that (Petitioner) be placed in a temporarily not physically qualified status with the understanding that the member be reexamined and evaluated in September 1992.

... If assignment to a temporarily not physically qualified status is not administratively acceptable, it is the opinion of this Command that (Petitioner) is not physically qualified for retention in the Reserve by reason of status post open reduction internal fixation fracture left patella December 1991 presently requiring period of rehabilitation.

e. On 24 June 1992 the Bureau of Naval Personnel (BUPERS) directed discharge, to be effective in 30 days unless Petitioner requested a review by the Physical Evaluation Board (PEB). On 2 July 1992 the commanding officer informed Petitioner of the foregoing and gave him an opportunity to request a review by the PEB. Seven days later, Petitioner requested a formal hearing to challenge the Navy's decision to discharge him. The next entry in the record shows that he was honorably discharged on 24 July 1992.

f. Petitioner reenlisted in the Naval Reserve on 29 April 1998 in the advanced pay grade program and was temporarily advanced to EO2 (E-5). Since his reenlistment he has attained two qualifying years for reserve retirement and has earned points towards another qualifying year. A statement of service, dated 30 October 2000, shows that he has accumulated 11 years of service for reserve retirement.

g. Petitioner contends in his application that he was illegally discharged from the Naval Reserve on 24 July 1992 because his request to have his case heard by a PEB was not acted on. It is further contended that the discharge was illegal because such action was taken only 22 days after being informed that he had 30 days in which to request further consideration of his case.

h. The Board is aware that the courts have consistently held that an individual has no right to reenlist and the Board is

only required to grant constructive service, if it finds an error or injustice, until the expiration of an enlistment.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board notes that the seriousness of Petitioner's knee injury is not in dispute and he was clearly not physically qualified to remain in a drilling status. BUMED recommended, as one of the options, that he be retained in the Naval Reserve until he was reevaluated in October 1992. The fact that BUPERS accepted the other option to discharge him does not mean that an abuse of discretion occurred. Given these circumstances it may be that consideration of the case by a PEB would not have resulted in a different decision. However, it is clear that Petitioner was discharged without being given the opportunity to have his case considered by a PEB as required. Further, consideration by a PEB would have extended his service in the Naval Reserve and he may have become physically qualified during this additional service.

Given the circumstances, the Board concludes that Petitioner's discharge on 24 July 1992 was improper and should be canceled. The record will then show that he served in the Naval Reserve until he was honorably discharged at the expiration of his enlistment on 29 September 1994. Since Petitioner was in a drilling status when he injured his knee, the Board further concludes that the record should show that he became physically qualified in October 1992 and earned four pay drills in each month from October 1992 to 29 September 1994.

Petitioner's request for restoration to OS1 and continuous service from 29 September 1994 until his reenlistment in the Naval Reserve on 29 April 1998 was considered. However, he did not reenter the Naval Reserve for over five years after his discharge on 24 July 1992 and no explanation for this delay has been provided. The Board also notes that there is no right to further service beyond the expiration of an enlistment. Given the circumstances, the Board concludes that a correction to the record to show continuous service and advancement to OS1 is not warranted. Concerning his request for service as an OS1, the Board notes that the unit Petitioner rejoined as an EO2 in 1998 was a Seabee unit, that does not need individuals in the OS rating. The Board took no action on his request for the remainder of his reserve enlistment bonus because payment will flow from the cancellation of his discharge.

Finally the Board concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future

reviewers will understand that he became physically qualified in October 1992 and earned two qualifying years thereafter.

RECOMMENDATION:

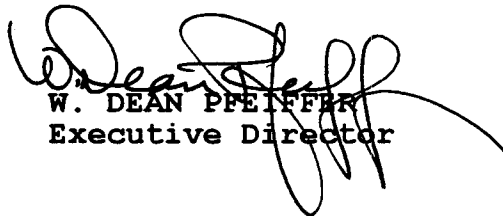
- a. That Petitioner's naval record be corrected to show that he was not discharged on 24 July 1992 but continued to serve in the Naval Reserve until he was honorably discharged on 29 September 1994.
 - b. That Petitioner's naval record be further corrected to show that he earned four pay drills in each month during the period 1 October 1992 until 29 September 1994.
 - c. That the remainder of his requests be denied.
 - d. That this Report of Proceedings be filed in Petitioner's naval record.
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director